TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

No. 161.

STEPHEN C. MILLS, PLAINTIFF IN ERROR,

vs.

MONTRESSOR T. ALLEN, ADMINISTRATOR OF STEPHEN DOW, DECEASED.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

FILED OCTOBER 12, 1886.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

No. 161.

STEPHEN C. MILLS, PLAINTIFF IN ERROR,

vs.

MONTRESSOR T. ALLEN, ADMINISTRATOR OF STEPHEN DOW, DECEASED.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

INDEX.

	Original.	Print.
Writ of error	1	1
Return on writ of error	2	1
Caption	3	2
Declaration	4	2
Exhibit A—Assignment of contract	5	3
Amendment to declaration	7	4
Exhibit B—Account	10	6
Answer of defendant Stephen Dow	12	7
Amended answer of defendant Stephen Dow	12	7
Amendment to declaration	12	8
Exhibit C—Account	14	9
Plaintiff's motion for auditor	15	9
Default of defendant Pratt	15	9
Verdict for defendant Dow	15	9
Judgment on verdict	15	9
Bill of exceptions	16	10
Exhibit A—Contract	19	12
Assignment of errors and prayer for reversal	22	13
Clerk's certificate	25	14
Copy bond on writ of error	26	15
Citation and proof of service	27	16

JUDD & DETWEILER, PRINTERS, WASHINGTON, JULY 29, 1889.

1 UNITED STATES OF AMERICA, *ss:*

[Seal of the Circuit Court, Massachusetts.]

The President of the United States to the honorable the judges of the circuit court of the United States for the district of Massachusetts, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, between Stephen C. Mills, of Norridgewock, in the county of Somerset and State of Maine, plaintiff, and Stephen Dow, of Woburn, in the State of Massachusetts, one of the defendants, in an action of contract between the said Stephen C. Mills, plaintiff, and the said Stephen Dow and one Nathan P. Pratt, defendants, a manifest error hath happened, to the great damage of the said plaintiff, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done herein to correct that error what of right and according to the laws and custom of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the twenty-eighth day of November, in the year of our Lord one thousand eight hundred and eighty-five.

JOHN G. STETSON,
Clerk of the Circuit Court of the United States,
District of Massachusetts.

Allowed by—
LE BARON B. COLT,
U. S. Circuit Judge, First Judicial Circuit.

2 Circuit Court of the United States.

DISTRICT OF MASSACHUSETTS, *ss:*

And now here the judges of the circuit court of the United States in and for the district of Massachusetts make return of this writ by annexing hereto and sending herewith, under the seal of the said circuit court, a true and attested copy of the record and proceedings in the suit within mentioned, with all things concerning the same, to the Supreme Court of the United States, as within commanded.

In testimony whereof I, John G. Stetson, clerk of said circuit court of the United States in and for the district of Massachusetts, have hereto set my hand and the seal of said court this seventh day of September, A. D. 1886.

Seal of the Circuit Court, Massachusetts.

JOHN G. STETSON, *Clerk.*

3 UNITED STATES OF AMERICA, *Massachusetts District*, } *ss:*

At a circuit court of the United States for the first circuit begun and holden at Boston, within and for the district of Massachusetts, on Friday, the fifteenth day of May, in the year of our Lord one thousand eight hundred and eighty-five.

Before the Honorable Le Baron B. Colt, circuit judge.

STEPHEN C. MILLS, of Norridgewock, in the County of Somerset and State of Maine, and a Citizen of said State, Plaintiff,

v.

STEPHEN DOW, of Woburn, and NATHAN P. PRATT, of East Cambridge, Citizens of and Residing in the District of Massachusetts, Defendants. } No. 1912.

In an action of contract, to the damage of the said Mills, as he says, the sum of twenty thousand dollars.

The writ in this cause is dated the thirtieth day of September, A. D. 1882, and was duly entered at the October term of this court, A. D. 1882, when and where the parties appeared by their respective attorneys.

4 On the sixteenth day of October, A. D. 1882, the following declaration was filed:

Declaration. (*Filed Oct.* 16, 1882.)

And the plaintiff says that the defendants made an agreement with the plaintiff, a copy of which is hereto annexed.

And the plaintiff further says that, being the contractor for building the Boston and Mystic Valley railroad bed, bridges, etc., named in said agreement, said defendants, on the 23d day of October, 1878, to wit, at Boston, in said district, for certain satisfactory considerations, agreed to purchase his contract with said company and pay him therefor the sum of fifteen thousand dollars and interest, and to assume certain other contracts, whereby the plaintiff had sublet to other parties named in said agreement some of the work for the construction of said railroad bed, bridges, etc., and the ten per cent. of the monthly estimates, which, by the terms of said contract, were to be retained thereunder; and also agreed to save the plaintiff harmless from any and all liability and claim by reason or on account of said subcontracts, and the ten per cent. reserved as aforesaid.

And the plaintiff says that the defendants have not fulfilled their said agreement with him and have not paid him said sum of fifteen thousand dollars and interest, and have not assumed and saved him harmless from all claim and liability by reason of said contracts, whereby he sublet said work as aforesaid, and the ten per cent. reserved as aforesaid, as they agreed and promised to do, but have wholly neglected and refused and still neglect and refuse to
5 do so, though requested; whereby and by reason whereof an action hath accrued to the plaintiff to have and recover of the defendants the sum of fifteen thousand dollars and interest.

And the plaintiff says that the defendants owe him the sum of fifteen thousand dollars according to the account hereto annexed.

Account Annexed.

Stephen Dow and Nathan P. Pratt to Stephen C. Mills, Dr.

To balance due for expenditures made and work done on the railroad bed, bridges, etc., of the Mystic Valley railroad under the contract in the agreement by said Mills with said Dow and Pratt dated Oct. 23, 1878, as per account annexed	$11,048 08
To balance of interest accrued	3,951 92
	$15,000 00

By his attorney, D. G. HASHINS, JR.

(Copy.)

A.

Whereas Stephen C. Mills, of Stark, in the State of Maine, is the contractor for the building of the Boston and Mystic Valley Railroad Company's railroad bed, bridges, etc., etc.; and whereas the said railroad company has agreed to purchase and cause to be cancelled the said contract, but said company has found it inconvenient or impossible to pay me the agreed price for such purchase; and whereas Stephen Dow, of Woburn, and Nathan P. Pratt, of Reading, have agreed to purchase of me the said contract in the interest of said railroad company and for the said company's benefit and
6 profit, and to receive of me an assignment of said contract in trust for said company—that is to say, as collateral security for payment to them by said company of the sum of fifteen thousand dollars, the purchasing price and interest thereon, at the rate of six per centum per annum, for such time as the same shall remain unpaid, which said sum of fifteen thousand dollars the said Dow and Pratt have this day advanced and paid to said Mills for said contract and all sums that may hereafter become due thereunder; and whereas the said Mills has sublet some of the work, as per contract, marked "B," "C," "D," "E" and hereto annexed, with Hall and Burgess, J. M. Ellis, and Savage and McCabe; and whereas the said Dow and Pratt assume said contract in their capacities aforesaid;

and whereas by the terms of said contract "A" ten per cent. of the monthly estimate is retained in the hands of the company, the said Dow and Pratt as aforesaid accept the assignment of said contract, with the understanding and agreement that they will and shall well and truly save harmless the said Mills from any and all liability by reason of said contracts, the ten per cent. reserved, and any claim by reason of said Ellis, Hall, and Burgess and Savage and McCabe agreements before mentioned:

Now, know all men that I, Stephen C. Mills, of Stark, in the State of Maine, the person named in the contract hereto annexed, marked "A," in consideration of fifteen thousand dollars to me paid by Stephen Dow, of Woburn, in the county of Middlesex and Commonwealth of Massachusetts, and Nathan P. Pratt, of Reading, in said county of Middlesex, in their capacity aforesaid, have assigned and do hereby assign, sell, convey, and set over to the said Dow and Pratt as aforesaid and their assigns all my interest in the
7 within and before-mentioned contract marked "A," and every clause, article, or thing therein contained, and I do hereby constitute and appoint them, the said Dow and Pratt, trustees as aforesaid, my attorney or attorneys in my name, but to their own use as aforesaid, to take all legal means which may be proper for the complete recovery and enjoyment of the assigned premises, with power of substitution. In witness whereof I have hereunto set my hand — seal this twenty-third (23) day of October, A. D. 1878.

S. C. MILLS & CO.
STEPHEN C. MILLS. [L. S.]

Signed, sealed, and delivered in presence of—
HENRY B. NOTTAGE.
P. WEBSTER LOCHE.

We, the said Stephen Dow and Nathan P. Pratt, hereby accept the above assignment and the conditions preceding the same for the purposes aforesaid.

STEPHEN DOW.
NATHAN P. PRATT.

Witness:
P. WEBSTER LOCHE.

On the seventh day of April, A. D. 1883, the following amendment to declaration was filed and allowed:

Amendment to Declaration. (*Filed April* 7, 1883.)

And now comes the plaintiff and, by leave of the court, amends his declaration and account annexed, as follows:

3rd count.

And the plaintiff says that prior to the 23rd day of October, 1878, he entered into a certain contract with the Boston and Mystic

Valley Railroad Company, a corporation organized under the
8 laws of the Commonwealth of Massachusetts, for the construction of said company's railroad bed, bridges, etc., as laid out by them under their charter, and that afterwards, prior to said 23d day of October, he entered into certain subcontracts with one H. C. Hall and others, whereby he underlet the constructions of portions of said railroad bed, bridges, etc., to said Hall and others, and thereby became liable and agreed to pay said subcontractors certain large sums of money for work done, materials furnished, and expenditures made by them under said subcontracts in the construction of said railroad bed, bridges, etc.; that said subcontractors entered upon and did a large amount of work, furnished materials, and made large expenditures thereon; that there was due on the 1st day of January, 1879, from him to said subcontractors for work so done, materials so furnished, and expenditures so made under said subcontracts, balance of eleven thousand forty-eight dollars and eight cents; which he was then, by reason of said contract with said Mystic Valley Railroad Co. and said subcontracts so entered into between him and said Hall and others, liable to pay.

And the plaintiff says that afterwards, on said 23d day of October, 1878, he made an agreement with the defendants relating to said contract and subcontracts, a copy of which agreement is hereto annexed, marked "B." (MEM.—This is the same as paper A, annexed to declaration, & as B, annexed to bill of exceptions.—J. G. S., clerk.)

And the plaintiff says that he has, on his part, kept his said agreement with the defendants, and that the defendants, on their part, have not kept the said agreement, but have broken the same, in this,
that they have not paid him said sum of fifteen thousand
9 dollars and have not assumed and saved him harmless from all claims and liability by reason and in consequence of said subcontracts so entered into between him and the said Hall and others, and for work done, materials furnished, and expenditures made thereunder by said Hall and others, and from said ten per cent. reserved as aforesaid, and as by their said undertaking they agreed and promised to do, and have not paid said Hall and others said sum or any part thereof, but have wholly neglected and refused to do so, though requested; and that said defendants owe him said sum of eleven thousand and forty-eight dollars and eight cents, with interest thereon from said 1st day of January, 1879, demand having been made therefor on that day.

(2.) By adding a fourth count as follows:

Fourth count.

And the plaintiff says that the defendants owe him fifteen thousand dollars according to the account hereto annexed, marked "B."

(3.) By adding an account annexed, marked "B."

10 *Account Annexed "B."*

WOBURN, MASS., *Jan'y 1st*, 1879.

Stephen Dow and Nathan P. Pratt to Stephen C. Mills, Dr.

To cash paid and work done under sub-contracts as follows:

1878.					
May	17.	To cash pd. for bill drain pipe		11 54	1
		" " "		1 35	2
June	15.	To May estimate:			
		18,166.8 cu. yds. earth, @ .20	3,633 36		
		17.2 " rock, " 1.25	21 50		
		89.4 " paving, @ 1.25	111 75		
				3,766 61	3
		To pd. Fish & Cook for laying drain pipe		3 00	4
		To pd. J. O. Monroe & Co. for lumber		17 37	5
July	15.	To June estimate:			
		36,439.8 cu. yds. earth, @ .20	7,287 96		
		169.2 " rock, " 1.25	211 50		
		60.8 " blind drain, @ 1.25	76 00		
		To overhaul by Savage & McCabe 822.6 cu. yds., @ 2c.	16 45		
				7,591 91	6
	26.	To cash pd. for 1 auger		1 25	7
		" " 200 pins		2 00	8
		" " drain pipe		9 45	9
		" " lumber (plank)		25 63	10
		" " trucking plank		50	11
		" " logs for foundation		30 00	12
Aug.	15.	To July estimate:			
		38,416.6 cu. yds. earth, @ .20	7,683 30		
		102.4 " rock, " 1.25	128 00		
				7,811 30	13
	19.	To cash pd. for logs		9 00	14
		" " J. M. Ellis (his July est.)		186 30	15
Sept.	15.	To Aug. estimate:			
		31,606.2 cu. yds. earth, @ .20	6,321 24		
		173.15 " rock, " 1.25	216 44		
		2.63 " paving, @ 1.25	32 87		
		To overhaul by F. & C. 381.9 cu. yds., @ 5c.	19 09		
		To overhaul by F. & C. 768 cu. yds., @ 6c.	46 08		
		To overhaul by S. & McC. 3,397.5 cu. yds., @ 6c.	203 85		
		To overhaul by P. K. 950 cu. yds., @ 3c.	28 50		
		To pd. for moving building	3 50		
		" cash for digging test pits	4 00		
				6,875 57	16
	16.	" " J. M. Ellis (his Aug. est.)		232 56	
				26,575.34	(17)
11		Am't bro't over		26,575.34	18
Oct.	15.	To Sept. est.:			
		27,111.8 cu. yds. earth, @ .20	5,422 36		
		665.7 " rock, " 1.25	832 12		
		Overhaul	458 42		
				6,712 90	19

Nov.	15.	To Oct. est.:				
		29,310.2 cu. yds. earth, @ .20	5,862 04			
		843.31 " rock, " 1.25	1,054 14			
		41.7 " paving, @ 1.25	52 12			
				6,968 30		20
Dec.	15.	To Nov. est.:				
		11,769.0 cu. yds. earth, @ .20	2,353 80			
		527.02 " rock, " 1.25	658 80			
		Overhaul	497 45			
				3,510 45		
					43,766 59	(21)

1878.		Cr.			
June	4.	By cash	500 00		22
	15.	"	2,889 95		23
July	15.	" & orders	5,902 65		24
Aug.	2.	"	600 00		25
	15.	" & orders	7,292 80		26
Sept.	15.	" "	6,431 33		27
Oct.	15.	" "	6,041 61		28
Nov.	15.	" "	4,938 41		29
Dec.	15.	" "	2,695 00		
				37,291 75	(30)
				$6,474 84	(31)
		To this balance add ½ of order given S. & McCabe for Oct. work still unpaid and all of order for Nov. work all unpaid; also for work done in Dec. still unmeasured.		1,694 22	(32)
				1,879 02	(33)
				1,000 00	(34)
		To bal. or interest %		$11,048 08	(35)
				3,952 92	(36)
		Total		$15,000 00	(37)

12 This cause was thence continued to the May term, A. D. 1883, when on the twenty-sixth day of May the following answer of defendant Dow was filed:

Answer of Defendant, Stephen Dow. (*Filed May* 26, 1883.)

And now comes the defendant Dow and denies each and every allegation, item, date, and amount in the plaintiff's writ, declaration, and accounts annexed contained, except the making of the agreement annexed to said declaration.

By his attorneys, SHATTUCK & MUNROE.

This cause was thence continued from term to term to the October term, A. D. 1884, when on the eighth day of December the following amended answer was filed by consent:

Amended Answer of Defendant, Stephen Dow. (*Filed Dec.* 8, 1884.)

And now comes the defendant Dow and denies each and every allegation, item, date, and amount in the plaintiff's writ, declaration, and accounts annexed contained.

By his attorneys, SHATTUCK & MUNROE.

On the twenty-sixth day of January, A. D. 1885, the following amendment to declaration was filed and allowed:

Amendment to Declaration. (*Filed Jan.* 26, 1885.)

Fifth count.

And the plaintiff says that on or about the — day of ——, 1878, at the request of the defendant, he made the contract with the
13 Boston and Mystic Valley Railroad Company referred to in the before-mentioned agreement and assignment dated on the 23d day of October, 1878, and hereto annexed to plaintiff's declaration and marked Exhibit "A;" that thereupon and relying on the fulfillment of said contract A he entered into certain contracts with H. C. Hall & Co. and others named in said assignment that they should perform certain of the work and labor and furnish certain of the materials which the plaintiff had agreed by said contract to do and to furnish, for which he agreed to pay them, and that they did work and furnish materials accordingly for which the plaintiff was indebted to them for a considerable sum; that thereupon the defendants, being stockholders and officers of said corporation, the said Dow being president and the said Dow and Pratt being directors thereof, requested him to assign to them said contract, under which he expected to make and receive large profits and benefits, and, in consideration of such assignment, offered, promised, and agreed that they would and did assume and would pay and save him harmless from any and all claim or liability by reason of said contracts with said Hall & Co. and others, and the ten per cent. thereon reserved, and that the plaintiff did accordingly make and deliver said assignment to the defendants in consideration of their said promises to him and of other valuable considerations, and the plaintiff then was and thereafter became subject to such claims and liabilities and ten per cent., as the defendants well knew, but that they have paid part only of said claims and liabilities so assumed and promised to be paid by them, so that the sum of $11,048.04, part thereof, with interest from January 1st, 1879, is still due and unpaid.

But the said defendants, although often requested, have
14 neglected and refused and still neglect and refuse to pay the same, and the plaintiff says the defendants owe him the said sum of $11,048.04, with interest thereon as aforesaid.

And the plaintiff says that the cause of action set forth in this count is a cause of action for which this action was intended to be brought, and in said action hereinbefore elsewhere alleged and intended to be alleged.

Sixth count.

And the plaintiff says that the defendants owe him five thousand dollars, with interest thereon from the 23d day of October, 1878, according to the account annexed, marked "C."

And the plaintiff says that the cause of action set forth in this count is a cause of action for which this action was intended to be brought, and in said action hereinbefore alleged and intended to be alleged.

C.

Account Annexed.

Stephen Dow and N. P. Pratt to Stephen C. Mills, Drs.

1878.			
Oct. 23.	To the consideration named in the assignment made by me to said Dow and Pratt, Oct. 23d, 1878, of my contract with the Boston and Mystic Valley R. R. Co. for the construction of said road		$15,000
	Credit.		
	By cash	10,000	
			10,000
	Balance due		$5,000

Interest from Oct. 23d, 1878.

15 On the twenty-seventh day of January, A. D. 1885, the following motion was filed:

Plaintiff's Motion for an Auditor. (*Filed Jan.* 27, 1885.)

And now the plaintiff comes and moves the court that an auditor may be appointed to hear the parties, examine their vouchers and evidence, state the accounts between the parties, and to make report thereof to this court as soon as may be.

By his attorney, A. G. STAUNCHFIELD.

Which motion was denied by the court.

This cause was thence continued to this present term, when, on the twenty-first day of September, the Honorable George M. Carpenter, district judge of the United States for the district of Rhode Island, duly assigned to hold said circuit court, sitting, the said defendant, Nathan P. Pratt, although solemnly called to come into court, does not appear, but makes default. A jury is thereupon empanelled and sworn to try the issue between the plaintiff and the defendant, Stephen Dow, namely, Alvan A. Evans, foreman, Benjamin J. Loring, Isaac B. Lawton, Onesime Levasseur. Charles C. Marble, John R. McCrillis, Henry A. Pierce, Samuel J. Spear, William A. Tupper, Samuel C. Weston, Levi L. Worrick, and Israel C. Vinal, who, after hearing all matters and things concerning the same, return a verdict for the defendant, Stephen Dow, by direction of the court.

It is thereupon, to wit, October 14, 1885, considered by the court that the plaintiff take nothing by his writ against the said defendant, Stephen Dow, and that the said defendant, Stephen Dow,
16 recover of the said Stephen C. Mills, plaintiff, his costs of suit, taxed at ——.

On the tenth day of October, A. D. 1885, the following bill of exceptions was filed and allowed by the Honorable George M. Carpenter, district judge of the United States for the district of Rhode Island, and is in the words and figures following:

Bill of Exceptions. (*Filed and Allowed Oct.* 10, 1885.)

This was an action of contract and was tried before Judge Carpenter with a jury at the May term, 1885. The writ is dated September 30, 1882. The pleadings are made part of this bill of exceptions. Said Pratt did not appear and was defaulted. There was evidence tending to show that the plaintiff, at Boston, in the Commonwealth of Massachusetts, on the 4th day of May, 1878, entered into a contract, which may be referred to, with the Boston and Mystic Valley Railroad Company, a corporation formed under the laws of said Commonwealth and duly established therein, of which the defendant Dow was president, to construct and equip a railroad from Somerville to the town of Wilmington, in said Commonwealth, which contract was executed in behalf of said corporation by the defendant Dow, its president, on the one part, and by the plaintiff on the other part; that on the sixth day of May, 1878, the plaintiff made a subcontract with said Hall and Burgess, annexed and marked A; that on the 23d day of October, 1878, the plaintiff and defendant executed the instrument annexed and marked B; that the subcontractors named in said instrument continued work on the road under their contract up to the middle
of December, 1878, and furnished the labor and materials
17 set forth in the plaintiff's declaration and account annexed, so that there was a balance due said Hall and Burgess from said Mills partly for work done prior to October 23, 1878, and in part for work done subsequently to that date exceeding $6,000; that the defendant Dow was informed of said amount due for work so done by said subcontractors, and that the same had never been paid. The plaintiff then offered to show by said Hall, for the purpose of proving an independent oral contract based on an alleged liability as stockholder, that said Dow repeatedly promised said Hall in 1879 and subsequently that he would pay the amount claimed to be due the subcontractors, Hall and Burgess, named in said agreement B, but the court refused to admit the evidence on the pleadings and evidence then in the case on the ground that there was no evidence of consideration for the promise and that the liability and the fact that he was a stockholder must be first shown. The plaintiff then offered to show by his own evidence that the consideration of said instrument B was the payment of $15,000, and that defendants promised to pay him said sum of $15,000 as said consideration, and had paid only $10,000 of said sum of $15,000, the plaintiff claiming that by the terms of the instrument B the defendant was bound to pay the whole of said consideration, and that on proof that the consideration was $15,000 and was partially unpaid he would be entitled to recover. The court held otherwise and ruled that the inquiry was therefore irrelevant on the proofs and pleadings as they then stood. He offered further to show as part of the

consideration of said instrument B that the defendants promised to pay the debts he owed Hall and others named in said instru-
18 ment, but the court refused to admit the evidence.

There was also evidence tending to show that the defendants were stockholders and directors of the company, and that Dow was the president thereof from May 1, 1878, to January 1, 1879; that Hall had authority from Mills to collect of the defendants the amounts due the subcontractors as set out on the account annexed; that Dow, at the request of Mills, paid one or more of the subcontractors named in Exhibit B, subsequent to entering into that agreement, the amount due them for work done on the road, besides the payment named below, to cover a judgment of Savage and McCabe against Mills; that before the commencement of this suit the subcontractors made demands on Mills for their pay, showing him a statement of their account, and also made demand on the defendants, and that Mills made like demand on the defendants therefor, and that, as between Mills and the subcontractors, there was no dispute as to the amount due; that the company voted to stop the work of construction on the road about the middle of December, 1878, and the contractors continued work up to that time, and that the company never resumed the work of construction; that Hall and Company did not complete their contract within the time stipulated therein for the reason, among others, that the company did not meet their payments and never secured the right of way for the portion not constructed by them; that Savage and McCabe sued Mills subsequent to October 23, 1878, and recovered judgment for a small sum for work done by them under their subcontract, which Mills has never paid to them, but that the amount of said judgment has been paid by Dow to Mills, and there is no claim in the account annexed to the declaration for said amount.

19 No evidence was introduced by the plaintiff that he had paid any portion of the sums due said subcontractors named in agreement B as aforesaid, and the plaintiff having closed his case the defendant contended that the plaintiff could not recover on the pleading and evidence without first showing some actual payment or injury other than the facts (1) of his liability to said Hall and Burgess due and made known to the defendant as aforesaid, and (2) that the same had not been paid; and the court so ruled, and that there was no competent evidence to sustain the plaintiff's case, and directed a verdict for the defendant, which was duly taken and entered of record.

To all which rulings and refusals to rule and direction of the court the plaintiff duly expected [excepted] at the trial, and prays that these his exceptions may be allowed and made a part of the record in this case.

10 October, 1885.

Allowed:

G. M. CARPENTER, *J.*

A.

H. C. Hall & J. H. Burgess, of the first part, and S. C. Mills & Co., of the second part, at Woburn, Mass., this sixth day of May, eighteen hundred and seventy-eight, agree as follows:

In consideration of payments, agreements, and covenants, to be made, kept, and performed by the party of the second part as hereinafter specified, the party of the first part hereby contracts and agrees to grade the road-bed for the Boston & Mystic Valley
20 railroad from its intersection with the Boston and Maine R. R., in Wilmington, through Woburn and to its intersection with the said B. & M. R. R., in Somerville.

It is agreed that the grading shall include the earthworks, clearing, and grubbing, excavating for foundations for masonry, ditching, changing the course of streams, and doing such other work as is usually included in the term "grading."

All of the said work to be done under the direction and to the acceptance of the engineer-in-chief who is now or who may be employed on said road, and to be completed in six months from this date.

The party of the second part to have the line prepared for work by the engineers of said road as fast as it may be required by the party of the first part to enable them to complete it in the time herein specified.

It as [is] agreed that all rock or stone, of any kind or quality whatever, that is required to be moved from or for said road-bed which measures one cubic yard or more shall be deemed solid rock, and the price for moving all such shall be one dollar and twenty-five cents per cubic yard, and the price for moving all other materials from or for said road-bed shall be twenty (20) cents per cubic yard.

It is further agreed that building French or blind drains and paving the foundations for masonry shall be included in the term "grading," and the price for doing such work shall be one dollar and twenty-five cents ($1.25) per cubic yard; ditching and all other earthwork not specified above shall be by the cubic yard—price, twenty cents. It is further agreed that one thousand feet
21 shall be deemed an extreme haul, and for all materials required to be moved more than one thousand feet from or for said road-bed the price shall be one cent per cubic yard additional for each hundred feet so moved.

Payments to be made as follows: Ninety per cent. of all work done in any one and each month as estimated and returned by the said engineer in chief shall be paid on or before the fifteenth day of the following month. The final estimate and all the ten per cent. retained from all the previous estimates shall be paid within thirty days from the date of completion and acceptance of said work by the said chief engineer of said road.

It is further agreed that in payment for the said work, if required by the party of the second part, the party of the first part shall receive and accept orders on the treasurer of the Boston and Mystic

Valley Railroad Company accepted by said treasurer and payable at the dates payments become due.

It is further agreed that where the material is unsuitable or to be obtained at great expense the road-bed may be left low to be filled with train by the party of the second part.

(Signed) S. C. MILLS & CO.
H. C. HALL.
J. H. BURGESS.

(MEM.—Instrument referred to in the foregoing exceptions as annexed thereto and marked B is the same as paper marked A referred to in the declaration hereinbefore set forth.—J. G. S., clerk.)

A true record.
Attest: JOHN G. STETSON, *Clerk.*

22 Circuit Court of the United States, District of Massachusetts.
In Equity.

STEPHEN C. MILLS
v.
STEPHEN DOW *et al.* } No. 1912.

Assignment of Errors and Prayer for Reversal, etc. (*Filed Dec.* 7, 1885.)

At a circuit court begun and held at Boston, in said district, on the 10th day of October, 1885.

Present: G. M. Carpenter, Esq.

This is an action of contract on the agreement and assignment set out in the declaration, also upon an account annexed for the unpaid balance of the consideration named in said agreement, also upon an account annexed for the amount due the said contractors named therein, and a count on an alleged special promise to pay the same.

The defendant Pratt did not appear and was defaulted.

May 4, 1878, the plaintiff entered into an agreement in writing with the Boston & Mystic Valley Railroad Company to construct and equip a railroad from Somerville to Wilmington, in the State of Massachusetts, which was duly executed by the plaintiff, in his own behalf, and by the defendant Dow in behalf of said corporation, as president thereof.

May 6, 1878, the plaintiff sublet the work of construction to H. C. Hall and others.

23 Oct. 23, 1878, the plaintiff and defendants made the agreement and assignment declared on, all of which were evidence in the case put in by the plaintiff without objection. The subcontractors continued work on the road up to about January 1st, 1879, and until the company voted to abandon the work of construction, and did so. At this time there was due the subcontractors for work done and materials furnished the sums named in the account annexed, which is still unpaid, being in part for work done before October 23, 1878, and in part for work done after that date. The

plaintiff also offered evidence tending to show that the sum of $15,000 named in said agreement and assignment was the consideration thereof, and that the defendants agreed to pay said sum as such consideration and had paid $10,000 only on account thereof at the time of its execution and delivery, and the balance was still due and unpaid, and that the defendants had so stated and admitted to him, the witness, and offered and promised to pay the same before the commencement of the suit, but the court ruled that the evidence was inadmissible, either under the count upon the agreement or under the count upon the account annexed for the same cause, and excluded the same; to which ruling and exclusion the plaintiff duly excepted.

The plaintiff also offered evidence tending to show that after the subcontractors stopped work they stated their account and made demand on him for its payment; that he notified the defendants of the amount due the said contractors and made demand on them for the payment of the same, and that they promised to pay it, but the court ruled that the evidence was inadmissible, either under count upon the agreement, under the count upon the account an-
24 nexed for the same cause, or under the special count therefor, and excluded the same, though the plaintiff offered evidence tending to show that the defendants had paid some of the contractors named in said agreement, and that they were stockholders and directors of said company, and that said Dow was president thereof; to which ruling and exclusion the plaintiff duly excepted.

And the court also ruled that the plaintiff could not recover any sum whatever on said agreement of Oct. 23, 1878, unless he proved other damage than the fact that the amount due the subcontractors had not been paid, though demanded as aforesaid, and that upon the whole evidence admitted and offered to be proved, as set out in the annexed bill of exceptions, the action was not maintainable on the pleadings for any sum whatever, and ordered a verdict for the defendants; to each and all of which rulings and order of the court the plaintiff duly excepted at the trial, and his exceptions were duly allowed and are a part of the record in this case.

And the plaintiff assigns for error the several rulings aforesaid excluding the evidence offered, as set out in said exceptions, and the final order of the court directing a verdict for the defendants, and prays that said rulings and order may be reversed, that said verdict may be set aside, and a new trial forthwith ordered.

By his attorneys, GEORGE S. HALE & SON.

25 *Clerk's Certificate.*

UNITED STATES OF AMERICA, *Massachusetts District*, } ss:

I, John G. Stetson, clerk of the circuit court of the United States for the first circuit and district of Massachusetts, certify that the foregoing is a true copy of the record of said circuit court in the

cause entitled, No. 1912, Stephen C. Mills *v.* Stephen Dow *et al.*, lately determined in said circuit court, and of all proceedings therein and of the assignment of errors and prayer for reversal therein.

In testimony whereof I hereunto set my hand and affix the seal of said circuit court, at Boston, in said district, this seventh day of September, in the year of our Lord one thousand eight hundred and eighty-six, and of the Independence of the United States the one hundred and eleventh.

Seal of the Circuit Court, Massachusetts.

JOHN G. STETSON, *Clerk.*

26 (*Bond on Writ of Error.*)

Know all men by these presents that we, James Savage, of Augusta, in the State of Maine, and Henry C. Hall, of Woburn, Massachusetts, are held and firmly bound unto Stephen C. Mills, of Norridgewock, in the county of Somerset and State of Maine(?), in the full and just sum of five hundred dollars, to be paid to the said Stephen C. Mills(?), his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated the twenty-eighth day of November, in the year of our Lord one thousand eight hundred and eighty-five.

Whereas lately, at a circuit court of the United States for the district of Massachusetts, in a suit depending in said court between said Stephen C. Mills, plaintiff, and Stephen Dow, of Woburn, and Nathan P. Pratt, of Cambridge, Massachusetts, defendants, judgment was rendered against the said Stephen C. Mills, plaintiff, and the said Stephen C. Mills having procured a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said defendant, Stephen Dow, citing and admonishing him to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next:

Now, the condition of the above obligation is such that if the said Stephen C. Mills, plaintiff, shall prosecute his said writ of error to effect and answer all damages and costs if he fail to make his plea good, then the above obligation to be null and void; otherwise to remain in full force and virtue.

JAMES SAVAGE. [L. S.]
HENRY C. HALL. [L. S.]

Signed, sealed, and delivered in presence of—
JOHN G. STETSON, to J. S.
A. H. TROWBRIDGE, to H. C. H.

Approved:
LE BARON B. COLT,
U. S. Circuit Judge, First Judicial Circuit.

A true copy of the bond taken by the judge at the time of allowing the writ of error named in said bond; which bond is on file in the office of the clerk of the circuit court of the United States for the first circuit and district of Massachusetts.

Attest: JOHN G. STETSON,
Clerk U. S. C. C., Mass. Dist.

27 *Citation.*

The United States of America to Stephen Dow, of Woburn, in the State of Massachusetts, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States within and for the district of Massachusetts, wherein Stephen C. Mills, of Norridgewock, in the county of Somerset and State of Maine, is plaintiff in error and you are defendant in error, to show cause, if any there be, why judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Le Baron B. Colt, United States circuit judge for first judicial circuit, this twenty-eighth day of November, in the year of our Lord one thousand eight hundred and eighty-five.

LE BARON B. COLT,
U. S. Circuit Judge, First Judicial Circuit.

We hereby accept service of the foregoing citation.
SHATTUCK & MUNROE,
Attorneys for Stephen Dow.

Endorsed on cover: Massachusetts C. C. U. S. No. 161. Stephen C. Mills, plaintiff in error, *vs.* Montressor T. Allen, administrator of Stephen Dow, deceased. Filed October 12, 1886.

Supreme Court of the United States.

OCTOBER TERM, 1889.

STEPHEN C. MILLS, *Plaintiff in Error*,

v.

MONTRESSOR T. ALLEN, *Administrator of* STEPHEN DOW.

PLAINTIFF'S BRIEF.

Abstract of Case.

May 4, 1878, the plaintiff contracted with the Boston and Mystic Valley Railroad Company to build and equip a railroad from Somerville to Wilmington, in the State of Massachusetts, to be completed within one year (pp. 3, 10).

May 6, 1878, plaintiff sublet the work of construction to H. C. Hall & Co. (pp. 10, 12). Oct. 23, 1878, and before completion, the defendant's intestate and the defendant N. P. Pratt, stockholders and directors of said railroad, purchased of the plaintiff and took an assignment (pp. 3, 4) of his contract with the Boston and Mystic Valley Railroad Company, agreeing to pay him therefor the sum of $15,000, and to assume the contract with Hall & Co. and to save the plaintiff harmless from all liability by reason of said contracts, and the ten per cent reserved, and any claim by reason of said subcontracts. Of this consideration Dow and Pratt paid $10,000 only down, leaving due both a balance of $5,000

and interest from Oct. 23, 1878, and the further sum of $11,048.08 due Hall & Co. for work done under their contract, part before and part after the assignment, with interest from Jan. 1, 1879, which are the sums sought to be recovered in this suit. Plaintiff declares specially and upon accounts annexed for each of said sums (pp. 2, 4, 5, 9). Pratt was defaulted. Dow appeared and defended. His answer was a general denial only, except that he admits the making of the agreement annexed to the declaration (p. 7). At the trial before the jury, said contracts and agreement of assignment were proven and put in evidence without objection (pp. 10, 13). It appeared that Hall & Co. continued work under their contract after the assignment, and furnished the labor and materials, as shown by the account annexed (pp. 5, 6, 7, 10), and that there was a balance due therefor, as aforesaid, of $11,048.08, with interest from Jan. 1, 1879; that Dow and Pratt were informed thereof, and informed that the amount due was unpaid (p. 10), and Dow promised (p. 10) to pay the same. Plaintiff offered to show by his own evidence that the consideration of said assignment was $15,000, that the defendant promised to pay that sum and had paid only $10,000, but the court refused to admit the evidence, and the plaintiff excepted.

The plaintiff offered further to show that the defendant promised to pay, as part of the consideration of said assignment, the debts the plaintiff owed Hall & Co., the subcontractors named in said instrument, but the court refused to admit the evidence, and the plaintiff excepted.

There being evidence that the defendants were stockholders and directors, and that Dow was president of the company from May 1, 1878, to Jan. 1, 1879, that Hall was authorized

by plaintiff to collect the amounts due the subcontractors, as set out in said account annexed, that Dow did pay some of the subcontractors after the assignment was made, that before the commencement of this suit the subcontractors made demand on the plaintiff for their pay, showing him a statement of the account, as to which there was no dispute, and the plaintiff made like demand on the defendants therefor, the court ruled that upon all this evidence the plaintiff could not recover without other proof of payment by or injury to the plaintiff, and withdrew the case from the jury, and ordered a verdict for the defendant, to all which the plaintiff duly excepted.

Specification of Errors relied on.

The plaintiff relies upon the following errors:—

1. The refusal of the court to admit the evidence offered as to the consideration of $15,000, and as to the promise to pay the balance thereof, and as to the promise to pay the debts due said Hall & Co.

2. The ruling of the court that the plaintiff could not on the pleadings recover in the case on all the evidence admitted and offered without showing some actual payment or injury other than the plaintiff's liability to Hall & Co., due and made known as aforesaid to the defendant.

3. The ruling that there was no competent evidence to sustain the plaintiff's case.

4. And his withdrawal of the case from the jury and ordering a verdict for the defendant.

There are two independent claims:

First. For a part of the $15,000 named as the consideration remaining unpaid, to wit, $5,000 and interest. *Second.*

For the debts due Hall & Co., also unpaid, and interest, under a contract which the defendants had assumed in writing, and for a sufficient consideration, and in which they had agreed to save the plaintiff harmless from all claim and liability on account thereof, and which they had orally promised to pay while the work for which it was due was going on and unfinished.

I.

It is submitted that under the general denial it was not open to Dow's intestate to allege any estoppel by the acknowledgment of the receipt of the consideration.

Pub. Stats. of Mass., Chap. 167, Sects. 15, 20, 22.
Middlesex Co. v. *Osgood*, 4 Gray, 447, 448.
Young v. *Raincock*, 7 C. B. 309, 338.

However that may be, we say the subject matter of the assignment was in Massachusetts, the defendant a resident in that State, the contract made there, the suit pending there, and the law of Massachusetts is to govern in enforcing and expounding it and to be the rule of damages for breach.

Cox v. *United States*, 6 Pet. 172, 202, 203.
Consequa v. *Willing's Heirs*, Pet. C. C. 225.

The plaintiff offered to show that the agreement or assignment admitted in evidence was made in consideration of $15,000; that the defendants agreed to pay that sum as such consideration, and had paid only $10,000, and claimed by the pleadings the balance of $5,000 (pp. 2, 5, 9). It is no defence to this (if true, which is denied) that the assignment (p. 3) contains an admission of the receipt of the whole sum, and the only question on this branch of the

case is whether the plaintiff is precluded from showing the facts which must be assumed to be true as is held in

Galvin v. *Thompson*, 13 Me. 367.

Judge Merrick says in *Paige* v. *Sherman*, 6 Gray, 511, 513:—

"We consider it to be perfectly well settled that a grantor is not absolutely bound by the consideration or the acknowledgment of its payment expressed in his deed. These are recitals merely which afford only *prima facie* proof which is subject to be controlled or rebutted by other evidence, . . . and it has been held that an action will lie against the grantee for a part of the consideration which he has failed in fact to secure or pay, although payment of the whole may be acknowledged by the terms of the deed."

This was an action like the present for the balance due of a sum recited to have been paid in a deed. So *Wilkinson* v. *Scott*, 17 Mass. 249, was an action for the balance of the consideration of a deed, payment of which was acknowledged therein.

Oral evidence of a promise to pay a sewer assessment as part of the consideration of a purchase was held competent to sustain the action in *Carr* v. *Dooley*, 119 Mass. 294, 296.

See also 1 Greenl. Ev., Sect. 26 (*n.* 2), Sect. 285.
Schillinger v. *McCann*, 6 Greenl. 364.
Beach v. *Packard*, 10 Vt. 96.
Shephard v. *Little*, 14 Johns. 210.
M'Crea v. *Purmort*, 16 Wend. 460.
Pritchard v. *Brown*, 4 N. H. 397.
Belden v. *Seymour*, 8 Conn. 304, 312.
Watson v. *Blaine*, 12 S. & R. 131, 137.
Gully v. *Grubbs*, 1 J. J. Marsh, 387, 389.

The language claimed to be an acknowledgment of the receipt of $15,000, in the assignment, viz., "which said sum of $15,000 the said Dow and Pratt have this day advanced and paid to said Mills for said contract," does not show actual payment and is ambiguous.

In *Goldshede* v. *Swan*, 1 Exch. 154, the language used was, "In consideration of your having this day advanced," etc. Pollock, C. B., said, "The expression 'this day' may mean something which has been done or is to be done this day."

Rolfe, B., said, "The question turns upon the meaning of the words 'your having this day advanced,' which may mean either in consideration that you *have* this day advanced or in consideration that you *shall have* this day advanced. The expression may mean either."

II.

In like manner the evidence of a promise to pay the debts the plaintiff owed Hall & Co., as part of the consideration of said instrument, was clearly admissible; and the refusal to pay on demand was a breach of the contract —

Clark v. *Deshon*, 12 Cush. 589, 591,
Clifford v. *Turrill*, 9 Jur. 633, and cases before cited,

and not within the statute of frauds.

Hubon v. *Park*, 116 Mass. 541.
Aldrich v. *Ames*, 9 Gray, 76.

The assignment being admitted by the pleadings (p. 7), and the issue to be tried being the payment of the consideration and whether the defendants' obligation was broken, it is submitted that it was competent for the plaintiff to show

by parol that after Hall & Co. finished work under their subcontract, they stated their account to him and demanded payment; that he notified the defendants and made demand on them and that they promised to pay; that such demand and promise and neglect or refusal to pay tend to support the contention of the plaintiff.

It appeared that the liability under the contract (p. 12) of Mills to Hall & Co. (pp. 7, 10) was the balance due them of $11,048.08 with interest from Jan. 1, 1879.

The plaintiff claims to recover this: 1st, under the promise offered to be shown (p. 11); 2d, under the contract to assume the contract of Hall & Co. and to save the plaintiff harmless from any and all liability by reason of said contracts, the ten per cent reserved and any claim by reason of said subcontracts (p. 4); 3d, under the subsequent promise.

As to the original promise see authorities cited.

As to assuming the contract and saving the plaintiff harmless therefrom, see *Braman* v. *Dowse*, 12 Cush. 227, where the language in a deed poll accepted by the defendant from the plaintiff was, "the same premises being subject to a mortgage of $1,150.40 which said Dowse is to assume, it being part of the above consideration."

Shaw, C. J., says, p. 228: "That such an acceptance of a deed poll constitutes a contract and promise by the grantee to the grantor, seems well settled by authority," and decided that the failure by the defendant to pay the mortgage was a breach of the contract entitling the plaintiff to recover without further proof. "The effect," he says, "therefore of the undertaking to assume the mortgage under these circumstances was an undertaking to pay the plaintiff's debt out of a fund furnished to the defendant by him for that purpose," etc.

In this case the fund furnished was the contract with the company, the benefit of which, like the mortgaged premises in *Braman* v. *Dowse*, passed absolutely to the defendants.

Carr v. *Roberts*, 5 Barn. & Ad. 78.
Stout v. *Folger*, 34 Iowa, 71.
Lathrop v. *Atwood*, 21 Conn. 117, 125.

In *Locke* v. *Homer*, 131 Mass. 93, the language was, "except a mortgage . . . which the grantee assumes and agrees to save the grantors harmless from"; and after a long and full discussion of the authorities by Mr. Justice Gray, then chief justice of the Supreme Court of Massachusetts, the action was sustained. He sums up the matter as follows (p. 109):—

"The only differences between *Furnas* v. *Durgin* and the case at bar are that in the present case it is not in terms stipulated that the defendant shall 'pay' as well as 'assume' the mortgage, and that it stipulated that he shall 'hold the grantors harmless from' the same. These differences do not affect the result. Under such circumstances, in common understanding and in legal effect, to 'assume' a debt is an undertaking to pay it as the proper debt of the party who enters into the undertaking. *Braman* v. *Dowse*, 12 Cush. 227. *Drury* v. *Tremont Improvement Co.*, 13 Allen, 168, 171. *United States Mortgage Co.* v. *Hill*, above cited [C. C. U. S., Dist. Mass., May term, 1879], *Stout* v. *Folger*, 34 Iowa, 71. And it is well settled, as appears by the cases already referred to, that when the defendant promises to pay a certain debt due from the plaintiff to a third person, the effect of this promise is not restricted, either as to the form of pleading, the rules of evidence, or the measure of damages, by the fact that the defendant by his agreement further promises to indemnify the plaintiff and save him harmless."

The court were unanimous in the opinion that if the defendant had in writing promised to pay the mortgage, the plaintiffs might have recovered the amount without proof that they had paid it, and held, though not unanimously, that this deed contained such a promise (p. 102).

See also *Stewart* v. *Clark*, 11 Met. 384,

where it was held that the condition of the bond to pay all the just debts which the obligee "now owes" was broken by an omission to pay at maturity a note of the obligee, although the holder did not desire nor demand payment, and by an omission to pay within a reasonable time a sum due by the obligee by way of contribution to his co-contractors in an agreement made before the bond, although the liability and amount were not ascertained until after it.

Preble v. *Baldwin*, 6 Cush. 549,

where a suit on a promise to pay plaintiff's taxes was held maintainable before he paid them.

And *Smith* v. *Pond*, 11 Gray, 234,

where the Court, Merrick, J., says: —

"Whenever for an adequate consideration a person expressly promises to pay the debt of another and to save him harmless therefrom, the failure of the latter to perform his agreement by the payment of the debt when it becomes due gives to the former an immediate right of action, on which he will be entitled to recover the whole amount of the debt, although he has not then paid any part of it."

See also *Paper Stock Disinfecting Co.* v. *Boston Disinfecting Co.*, 147 Mass. 318.

The agreement of Dow and Pratt to assume plaintiff's con-

tract with Hall & Co. and to save him harmless from any and all liability by reason of said subcontracts and any claim by reason thereof, even if in any sense an agreement to indemnify, is not an agreement to indemnify merely, but an agreement to pay. The manifest purpose of taking the assignment, the condition of the property and its nature and the circumstances of the parties show this. They were not mere guarantors. They took the place of Mills, and became, after the assignment, principals in the work of construction. They took it upon themselves. They in terms accepted the assignment with all the conditions preceding the same, including, of course, the subcontracts and what was due and to become due upon them (p. 4). The admissions, the promises to pay, and partial payments tend to show that they so understood their relation to the work and the parties. Mills, if any one, held the relation of guarantor after the assignment. This is not a mere contract of indemnity from damage; it is an agreement to assume another contract and substantially to acquit and discharge the plaintiff from liability for a debt. The defendants are chargeable even if they were guarantors, upon the evidence admitted and offered, and the failure to pay upon demand was a breach of this contract. A covenant to save harmless from *liability* is not a covenant to save harmless from *damage* by reason of a *liability*, and is broken when the liability is incurred without other proof of damages, and gives a right of action before actual payment by the party liable, to the full extent of the liability.

Gilbert v. *Wiman*, 1 Comst. 550.
Calvo v. *Davies*, 8 Hun. 222.

"An indebtedness incurred — a liability to pay — is a damage."

Noble v. *Arnold*, 23 Ohio St. 264, 271.

I "agree to be answerable . . . for all costs, damages and expenses you may sustain by reason," etc., was held to cover costs for which the plaintiff had become *liable* to his own attorney.

Spark v. *Heslop*, 28 L. J. N. S. Q. B. 197, 200.

In *Carr* v. *Roberts*, 5 B. & Adol. 78 (*supra*), counsel argue, "Could it be contended that this action would have been maintainable before the plaintiff was sued?" and Parke, J., says, "It might have been so contended if the time for payment of the annuity [against which the plaintiff claimed that the defendant had agreed to protect him] had expired and the defendant had not paid it. The covenant is not to indemnify merely but to 'save, protect, defend and keep harmless.'"

In *Chace* v. *Hinman*, 8 Wend. 452, Sutherland, J., says (p. 456):—

"There is no doubt as to the general proposition that in order to recover upon a *mere* bond of indemnity, actual damage must be shewn. If the indemnity be against the payment of money, the plaintiff must in general prove actual payment, or that which the law considers equivalent to actual payment. A mere legal liability to pay is not in such case sufficient; but if the indemnity be not only against *actual damage* or expense, but also against *any liability* for damages or expenses, then the party need not wait until he has actually paid such damages, but his right of action is complete when he becomes legally liable for them."

In *Rockefeller* v. *Donnelly*, 8 Cow. 623, Chancellor Jones

and Senator Spencer seem to hold that a bond (p. 624) to indemnify overseers from all "costs, charges, taxes, rates, assessments, damages or expenses for or by reason of the birth," etc., of a bastard child, yet unborn (p. 629), was broken as soon as the child was born (pp. 630, 639, 653).

On a breach of a warranty by A to B, B may recover what he is *liable* for to C on a like subwarranty of the same article although unpaid.

Randall v. *Roper*, 27 L. J. N. S. Q. B. 266.

See also

Warwick v. *Richardson*, 10 M. & W. 284 Com. Dig., Condition I.

Hodgson v. *Wood*, 2 H. & C. 649.

Port v. *Jackson*, 17 Johns. 239, cited in *Wicker* v. *Hoppock*, 6 Wall. 94.

Wood v. *Wade*, 2 Starkie, 167 (1st Am. Ed. 146).

Lathrop v. *Atwood*, 21 Conn. 125.

As Mr. Sedgwick says in his work on Damages, 7th edition, Vol. 2, p. 21: "Where the agreement is to indemnify against liability the suit is also in the nature of one for specific performance. Liability is a very different thing from payment; and I submit that the literal object of the covenant is not attained unless the plaintiff may rest on showing mere proof of *liability* and is relieved from the obligation of proving *damage*. The only way to relieve the plaintiff from being liable to be made to pay the debt is for the law to see to its extinguishment."

It is only in cases where indemnity is the sole object of the contract that the principle invoked by the defendant applies.

III.

The court was not authorized, upon the evidence admitted and offered, to withdraw the case from the jury and order a verdict for the defendant. If the evidence excluded tended in any way to support the issue as to the unpaid balance of the consideration of $15,000, or as to the balance due the subcontractors for work done before or after the assignment under either count or was a link in the chain, it was error to exclude it. The court will take as established all facts offered to be proved, and allow all legitimate inferences deducible from them.

Greenleaf v. *Birth*, 9 Pet. 292.
Schuchardt v. *Allen*, 1 Wall. 359.
Hickman v. *Jones*, 9 Wall. 197.
Farnum v. *Davidson*, 3 Cush. 232.
U. S. v. *Tillotson*, 12 Wheat. 180.
Gibbons v. *Farwell*, 63 Mich. 344.
Doane v. *Lockwood*, 115 Ill. 490.
Jones v. *Vanzandt*, 2 McL. 596, 601.
Battis v. *McCord*, 70 Iowa, 46.
Galvin v. *Thompson*, 13 Me. 367.

Of Counsel

Geo S. Hale

A Gleason Fuller

Supreme Court of the United States.

OCTOBER TERM, 1889.

STEPHEN C. MILLS, *Plaintiff in Error*,

v.

MONTRESSOR T. ALLEN, *Administrator of the Estate of* STEPHEN DOW.

DEFENDANT'S BRIEF.

STATEMENT OF THE CASE.

This is an action of contract on a written agreement and acceptance, a copy of which is as follows: —

Whereas, Stephen C. Mills, of Stark, in the State of Maine, is the contractor for the building of the Boston and Mystic Valley Railroad Company's railroad bed, bridges, etc., etc., and whereas the said railroad company has agreed to purchase and cause to be cancelled the said contract, but said company has found it inconvenient or impossible to pay me the agreed price for such purchase; and whereas, Stephen Dow, of Woburn, and Nathan P. Pratt, of Reading, have agreed to purchase of me the said contract, in the interest of said railroad company and for the said company's benefit and profit, and to receive of me an assignment of said contract in trust for said company, that is to say, as collateral security for payment to them by said company of the sum

of fifteen thousand dollars, the purchasing price and interest thereon, at the rate of six per centum per annum, for such time as the same shall remain unpaid, which said sum of fifteen thousand dollars the said Dow and Pratt have this day advanced and paid to said Mills for said contract, and all sums that may hereafter become due thereunder; and whereas the said Mills has sublet some of the work, as per contract, marked "B," "C," "D," "E," and hereto annexed, with Hall and Burgess, J. M. Ellis, and Savage and McCabe; and whereas the said Dow and Pratt assume said contract in their capacities aforesaid, and whereas by the terms of said contract A ten per cent of the monthly estimate is retained in the hands of the company, the said Dow and Pratt, as aforesaid, accept the assignment of said contract with the understanding and agreement that they will and shall well and truly save harmless the said Mills from any and all liability by reason of said contracts, the ten per cent reserved, and any claim by reason of said Ellis, Hall and Burgess, and Savage and McCabe agreements before mentioned.

Now know all men that I, Stephen C. Mills, of Stark, in the State of Maine, the person named in the contract hereto annexed marked "A," in consideration of fifteen thousand dollars to me paid by Stephen Dow, of Woburn, in the county of Middlesex and Commonwealth of Massachusetts, and Nathan P. Pratt, of Reading, in said county of Middlesex, in their capacity aforesaid, have assigned and do hereby assign, sell, convey and set over to the said Dow and Pratt as aforesaid, and their assigns, all my interest in the within and before mentioned contract marked "A," and every clause, article or thing therein contained, and I do hereby constitute and appoint them, the said Dow and Pratt, trustees as aforesaid, my attorney or attorneys, in my name, but to their own use as aforesaid, to take all legal means which may be

proper for the complete recovery and enjoyment of the assigned premises, with power of substitution.

In witness whereof I have set my hand and seal this twenty-third day of October, A. D. 1878.

S. C. MILLS & CO. [L. S.]
STEPHEN C. MILLS.

Signed, sealed and delivered in presence of
HENRY B. NOTTAGE.
P. WEBSTER LOCHE.

We, the said Stephen Dow and Nathan P. Pratt, hereby accept the above assignment and the conditions preceding the same for the purposes aforesaid.

STEPHEN DOW.
NATHAN P. PRATT.

Witness:
P. WEBSTER LOCHE.

Also upon an account annexed for the alleged unpaid balance of the consideration named in said agreement, also upon an account annexed for the amount due the subcontractors named therein, and a count on an alleged special promise to pay the same. Pratt, one of the defendants, was defaulted. Stephen Dow has died, and the action is defended by the administrator of his estate.

May 4, 1878, the plaintiff made a contract with the Boston and Mystic Valley Railroad Company, a Massachusetts corporation, of which said Dow was president and a director, to construct and equip a railroad from Somerville to Wilmington.

May 6, 1878, the plaintiff subcontracted with Hall and Burgess.

The contract in controversy was made Oct. 23, 1878.

The sub-contractors continued working to the middle of December, 1878, and at that time there was due to them and still unpaid a sum exceeding six thousand dollars for work prior and subsequent to Oct. 23, 1878, of which said Dow was informed.

The plaintiff offered to show by said subcontractor Hall, for the purpose of proving an independent oral contract based on an alleged liability as *stockholder*, that said Dow repeatedly promised said Hall, in 1879 and subsequently, that he would pay the amount claimed to be due said subcontractors, which evidence was excluded on the pleadings and evidence then in the case, on the ground that there was no evidence of consideration, and that the liability and the fact that he was a stockholder must first be shown. Thereupon the plaintiff proposed to testify that the consideration of said agreement was the payment of $15,000, which defendants promised to pay, but had paid only $10,000, claiming that by the terms of said agreement defendants were bound to pay said $15,000.

The court excluded the evidence on the proofs and pleadings as they then stood.

Plaintiff offered further to show, as part of the consideration of said agreement, that the defendant promised to pay the debts he owed said Hall and other subcontractors, which evidence was not admitted.

Plaintiff offered further to show that the defendants, Dow and Pratt, were stockholders and directors of the railroad company, and that the defendant's intestate, Dow, was president thereof from May 1, 1878, to Jan. 1, 1879; that plaintiff had authorized Hall to collect of the defendants the amounts due the subcontractors, as set out in the account annexed; that Dow, at the request of Mills, paid one or

more of the subcontractors, subsequent to entering into that agreement, the amount due them for work done on the road, beside a payment to cover a judgment of Savage and McCabe against Mills. Before the commencement of this suit, the subcontractors made demand of Mills for their pay, and showed him a statement of their account, and also made demand on the defendants, and that the plaintiff made like demand on the defendants therefor, there being no dispute between the plaintiff and the subcontractors as to the amount due: that the company, by vote, stopped the work of construction on the road about the middle of December, 1878, the contractors continuing work up to that time, and the company never resuming the work of construction; that the subcontractors, Hall & Co., did not complete their contract within the time stipulated therein, for the reason, among others, that the company did not meet their payments, and never secured the right of way for the portions not constructed by them; that Savage and McCabe, subsequent to Oct. 23, 1878, having recovered judgment for a small sum for work done by them under their subcontract, which Mills had never paid, but that the amount of said judgment has been paid by Dow, the defendant's intestate, to Mills, and there is no claim in the account annexed to the declaration for said amount.

There was no evidence that the plaintiff had paid any portion of the sums due said subcontractors. At the close of the plaintiff's case, the court ruled, at the request of the defendant, that the plaintiff could not recover on the pleadings and evidence without first showing some actual payment or injury other than the facts, (1) of his liability to said Hall and Burgess due and made known to the defendant as aforesaid, and (2) that the same had not been paid. The court also ruled, at request of defendant, that there was no compe-

tent evidence to sustain the plaintiff's case, and directed a verdict for the defendant, which was duly taken and entered of record.

Vide Bill of Exceptions.

I.

Under a general denial in the answer the plaintiff must prove each material allegation in the declaration.

Rodman *v.* Guilford, 112 Mass. 405.

There is nothing admitted by the answer except the making of said agreement.

The questions concerning the admissibility of evidence arise solely upon the allegations contained in the plaintiff's declaration. What the plaintiff is estopped from proving, the defendant need not plead specially.

II.

By the evidence offered the plaintiff endeavored to extend and enlarge the provisions of a written contract under the guise of proving by parol its consideration.

It is perfectly well settled that a grantor is not absolutely bound by the consideration or the acknowledgment of its payment expressed in his deed, because the consideration is known to be arbitrary, and a receipt is always open to explanation; and this acknowledgment, although under seal, is nothing more than a receipt, for the seal gives it no additional solemnity.

Wilkinson *v.* Scott, 17 Mass. 249, 257.

In Howe *v.* Walker, 4 Gray, 318, Thomas, J., says: "That is under the power of proving by parol the consideration of a written contract, you cannot establish an independent agreement, otherwise within the statute of frauds. Nor can you under the guise of proving by parol the consideration of a written contract add to or take from the other provisions of the written instrument. This would practically dispense with the statute of frauds, *and* with that sound rule of the common law which finds in the written contract the exclusive and conclusive evidence of the intent and agreement of the parties, and will not suffer such written contract to be varied or affected by any contemporaneous parol agreement."

In Flynn *v.* Bourneuf, 143 Mass. 277, Holmes, J., asserts that the authority of Howe *v.* Walker, *ubi supra*, is unshaken and is distinguished from Carr *v.* Dooley, 119 Mass. 294, Preble *v.* Baldwin, 6 Cush. 549, and similar cases.

Even the extreme case, Graffam *v.* Pierce, 143 Mass. 386, admits the axiom, that no "evidence of prior or cotemporaneous oral promise (could) be received, if the written contracts delivered appeared to contain all the engagements of the parties on the subject and to have been intended as a complete statement or performance of the whole contract."

The defendants claim that under the writings the intent of the parties is evident and conclusive.

It is that the defendants take the construction contract [between the plaintiff and the Boston and Mystic Valley Railroad Company] as trustees to hold like an escrow. That the effect of the assignment was to make them naked trustees to uphold the legal title of the construction contract for the benefit of the plaintiff and of the railroad respectively: for the railroad that when the purchase money and sums thereafter due under construction contract were paid by the rail-

road to them, and through them to the subcontractor, the contract might be cancelled; and on the other hand for the plaintiff that the contract might until then be kept alive till such payments were made by the railroad company through the defendants as trustees to the plaintiff and to his subcontractors.

The whole transaction is like the assignment of an insolvent for the benefit of his creditors where the assignee is to receive no personal benefit; and in this light the language of the writings is to be construed; or more like that of trustees of a mortgage given for the benefit of bondholders of a railroad.

The defendant claims: —

1. That oral evidence of any prior or contemporaneous oral agreement is inadmissible, as the writing here appears to contain the whole contract.

2. That the plaintiff is estopped by the particular recital of the payment of purchase money by the defendants.

3. That the agreements are limited, in a broad view, to the defendants in their character as trustees, and that in lack of evidence of trust funds in the hands of the trustees this action should fail.

4. That if the writings can import any personal undertaking, at most that undertaking can only be "to hold plaintiff harmless," *i. e.*, a contract of indemnity, and that the plaintiff having failed to show any payment by him, no damages have accrued to him.

I.

There can be no doubt, upon inspection thereof, that the writings here, including the indorsement subjoined by defendants, were intended to take in all the understanding and agreements of the parties.

II.

Preceding the body of the assignment is the recital that the railroad company desire to purchase and cancel the construction contract, but are unable to pay the purchase money; that the defendants have agreed to purchase in the interest of the railroad company, and for the company's benefit and profit, and to receive an assignment of such contract *in trust for the company*, that is to say, as *collateral security* for the payment to them by the company of $15,000, the purchase price and interest thereon, which sum said Dow and Pratt have *this day advanced and paid*, and all sums that may hereafter become due *thereunder*. Said Dow and Pratt as, aforesaid, accept the assignment. Moreover the receipt of the consideration money in the body of the instrument is recited to be from them "as trustees"; hence the plaintiffs should be estopped to claim that the consideration money was due personally in the face of this recital.

This recital that the $15,000 has been paid is an estoppel upon the plaintiff to deny that fact on the faith of which the assignment was accepted, and so far as concerns the plaintiff this estoppel is in an instrument under his seal.

Leddy *v.* Barney, 139 Mass. 394.

A recital of a particular fact in a deed is conclusive evidence of matter therein stated when it appears to be the object of the parties to make a material fact unquestionable, and that fact has been made the basis of action by one party who changes his position on the faith of such fact.

So. E. Ry. Co. *v.* Warton, 6 Hurl & N. 520.

Martin, B.: "A recital in such a deed would be binding if it was the bargain on the faith of which the parties acted."

Horton *v.* Westminster, 7 Ex. 780.

Recital that money was borrowed.

Plea that money not borrowed held poor. Martin, B.: "The meaning of estoppel is this, that the parties agree, for the purpose of a particular transaction, to state certain facts as true; and that, so far as regards that transaction, there shall be no question about them."

Lucy *v.* Gray, 61 N. H. 151.

recital that mortgaged property is personal, held an estoppel.

Mann *v.* Williams, 143 Mass. *394*, agreement to buy shares admits corp'n.

Hudson *v.* Greenwell Seminary, 113 Ill. 618, maker of note estopped to deny that payee is corp'n.

Lainson *v.* Tremire, 1 Ad. & E. 792.

Bond recited that rent of lease £170. Evidence is inadmissible to show *by lease itself* that rent £140.

Horton *v.* Westminister Co., 7 Ex. 780.

Estoppel means "parties agreed for particular purpose to state certain facts as true, and that so far as regards that transaction there shall be no question."

Bowman *v.* Taylor, 2 Ad. & E. 278,

recital that plaintiff invented loom, estoppel to show non-invention.

To create estoppel the general tenor of deed and intention of the parties is to be considered, and where a recital was necessary to interpret the body of the deed, it becomes material.

Here it was intended to make material the recital of the actual payment of the $15,000; why else should it not have sufficed to embody it in that usual part of the deed of assign-

ment which says, "in consideration of $15,000, to me paid by S. Dow . . . Pratt . . . *in their capacity as aforesaid*"?

Why repeat it in the recital that which said sum of $15,000 "Dow & Pratt have this day advanced *and paid* to said Mills," unless it was intended to make this material fact so strongly asserted and reiterated that Pratt & Dow might not be deterred from accepting the trusteeship by fear that they should be held personally?

Where a receipt embodies a contract it cannot be rebutted.

Baker *v.* Nachtrib, 19 Howard, 126.

Receipt for $200, and withdrawal from society, held to estop a suit founded on membership.

Moore *v.* Stinson, 144 Mass. 594,

where a trustee grantee was held estopped by the recital of payment of consideration by defendant as trustee from showing that he had personally paid the same. "This is in effect to contradict the deed to which he is a party."

In Hildreth *v.* O'Brien, 10 Allen, 104, a bill of parcels might be contradicted; but in Harper *v.* Ross, 10 Allen, 332, a bill of sale could not be shown to be a mortgage.

In many States in this country the action to recover the purchase money of a deed is sustained on the ground of the promise implied in law from the acceptance of a deed poll to pay the consideration thereof.

Here the contract implied in law is *superseded*

First, by above claimed estoppel.

Second, by the express written *acceptance* subjoined as follows: —

"We, the said Stephen Dow and Nathan P. Pratt, hereby accept the above assignment and the conditions preceding

the same for the purposes aforesaid. Stephen Dow, N. P. Pratt."

Presumably the implied condition upon which the assignment was accepted was that the fact of such payment should not be controverted, and that they should hold and be held only as trustees.

Until it be shown that as trustees the defendants have not administered the trust faithfully, or that they have in their hands trust funds which they have failed to pay over, the law will not imply a contract to pay the formal considerations.

Shoe and Leather Bank *v.* Dix, 123 Mass. 148.
Twomey *v.* Crowley, 137 Mass 184.

A.

So far as the defendants are bound by implication arising from the acceptance of a deed poll (if the writing be so construed), it is only binding upon them as trustees and not in their individual capacity.

B.

And so far as they are bound by their written acceptance, the form of the same limits their liability to their capacity as trustees, notwithstanding their naked signatures.

Will the court reform this contract by striking out of the body of the assignment from the sentences —

(1.) "in consideration of $15,000 to me paid by Stephen Dow . . . and Nathan P. Pratt . . . *in their capacity as aforesaid*";

(2.) "assign, sell and convey and set over to Dow & Pratt, as aforesaid";

(3.) ". . . I hereby constitute and appoint said Dow & Pratt *trustees as aforesaid . . .*"
the words "*in their capacity as aforesaid*," in the first sentence, the words "*as aforesaid*," in the second sentence, and the words "*trustees as aforesaid*," in the third sentence, in order to hold them personally liable on a contract implied in law?

Shoe and Leather Bank *v.* Dix, 123 Mass. 148.

Is it not rather to be presumed from a broad view of all the provisions of the writings that it was not the intent of the parties that the defendants be held personally, but merely as trustees?

The pivotal phrase in the writing is, "in their capacity" as trustees; the central idea is that they act as trustees, and in their acceptance they accept only for that purpose.

The following cases are cited to the points that the writing is the only evidence of the intent of the parties, and that on the whole writing there is no personal liability.

Goodenough *v.* Thayer, 132 Mass. 152.
Tucker *v.* Fairbanks, 98 Mass. 101.
Carpenter *v.* Farnsworth, 106 Mass. 561.
Terry *v.* Brightman, 132 Mass. 318.
Ellis *v.* Pulsifer, 4 Allen, 165.
Cutler *v.* Ashland, 121 Mass. 588.
Cook *v.* Gray, 133 Mass. 106.
Blanchard *v.* Blackstone, 102 Mass. 343.
Whitford *v.* Laidler, 94 N. Y. 145.

Even if this case should be construed, on the strength of the words "save harmless," to be a personal undertaking, it is merely a contract to indemnify, and as there is no proof of any payment by the plaintiff, his damages are nothing.

The distinction between an agreement or covenant of indemnity and an agreement to pay has been recognized in recent cases in Massachusetts.

Locke *v.* Homer, 131 Mass. 93–109.
Wilson *v.* Bryant, 134 Mass. 291–294.

In Locke *v.* Homer, 131 Mass. 93–109, the cases are reviewed; there the presence of the word "assume" is held to distinguish the case from that of simple indemnity.

In the present case the word "assume" is qualified by the words "in their capacity," *i. e.* as trustees. This case is within the line of contracts of indemnity alone, as recognized in

Cutler *v.* Southern, 1 Saunders, 116, note.

The fifth count seems to be upon a special oral agreement.

First. So far as this oral agreement may be claimed to be prior or cotemporaneous, the language of Graffan *v.* Pierce, 143 Mass. 308, already quoted, applies and excludes other evidence than the written contract, the intent of which is a question for the court alone.

Vass *v.* Wales, 129 Mass. 38.
Hagan *v.* Sartwell, 146 Mass. 33.
Samanovich *v.* Wood, 145 Mass. 180.
Munde *v.* Lambie, 122 Mass. 336.
Spurr *v.* Andrews, 6 Allen, 420.
Kelly *v.* Saltmarsh, 146 Mass. 585.
Knowlton *v.* Keenan, 146 Mass. 86.
Carr *v.* Hayes, 110 Ind. 408.
Burns *v.* Scott, 117 U. S. 582, note may not be shown memo'.

The Exhaust Vent. Co. *v.* The Chicago, M. & St. P. R. R., 69 Wis. 454.
Corse *v.* Peck, 102 N. Y. 513.
Brown *v.* Russell, 105 Ind. 46.
Myers *v.* Munson, 65 Iowa, 423.
Frost *v.* Brigham, 139 Mass. 43.

Second. So far as this count is intended to cover a subsequent oral agreement, in the absence of any proof of liability of the defendant, as stockholder or officer of the corporation, there was total lack of consideration for such promise.

STILLMAN B. ALLEN,
MONTRESSOR T. ALLEN,
Of Counsel for Defendant.

Supreme Court of the United States.

STEPHEN C. MILLS,

v.

MONTRESSOR S. ALLEN, Adm'r of Stephen Dow.

POINTS IN REPLY.

1. Plaintiff did not propose to show a different consideration from those set out in the assignment, but that the $15,000 named had not been fully paid, and that the liability by reason of certain contracts, had not been met.

2. The defendants did not take the assignment as trustees for the plaintiff, but in trust for the Railroad Company only, of which they were stockholders and directors. The assignment recites that it was so taken, it being "inconvenient or impossible" for the Company to pay the agreed price.

3. The undertaking of the defendants is personal, and they are personally holden.

Sumner v. *Williams*, 8 Mass. 162, 196, 207, 210, 212.
Donahoe v. *Emery*, 9 Met. 63.

4. We rely upon an express promise, and offer to show that the consideration agreed upon had not been paid, and that the defendants promised to pay it, but had not done so.

By HALE & STANCHFIELD,
Attorneys for Plaintiff.